United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

74-2480

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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NO. 74-2480

The City of Groton; Borough of Jewett City; Second Taxing District, City of Norwalk; Third Taxing District, City of Norwalk; City of Norwich; Town of Wallingford, and the Connecticut Municipal Gas and Electric Association,

Petitioners,

vs.

Federal Power Commission,

Respondent,

The Connecticut Light & Power Company,

Intervenor.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

BRIEF OF THE INTERVENOR

To be argued by:

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Preliminary Statement
Pursuant to Section 28,
Rules of the Court of Appeals
for the Second Circuit

The Orders of the Federal Power Commission sought to be reviewed were issued on August 30, September 27, November 8, and November 29, 1974. These Orders were issued in the proceeding of The Connecticut Light and Power Company, Federal Power Commission Docket No. E-8952.

TABLE OF CASES, STATUTES AND REGULATIONS

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STATEMENT OF THE ISSUES

I. Are these Orders of the Commission reviewable by this Court in this proceeding?

II. If such Orders are reviewable, is the Commission properly exercising its powers pursuant to the Federal Power Act?

III. In any event, is there a proper basis for the relief requested by the Petitioners?

STATEMENT OF THE CASE

The Connecticut Light and Power Company (CL&P) incorporates herein by reference the Statement of the Case contained in the Brief of the Federal Power Commission (Commission).

STATEMENT OF THE FACTS

CL&P incorporates herein by reference the Statement of Facts contained in the Brief of the Commission.

ARGUMENT

I. THE ORDERS OF THE FEDERAL POWER COMMISSION ISSUED ON AUGUST 30, SEPTEMBER 27, NOVEMBER 8 AND NOVEMBER 29, 1974, ARE NOT SUBJECT TO JUDICIAL REVIEW.

The first Order of the Commission, issued August 30, 1974, suspended for one day, CL&P's proposed rate increase, including the proposed fuel adjustment clause. In its subsequent two Orders, the Commission denied the applications of the Petitioners (Cities) 1/ for rehearings of the suspension provided in the first Order and clarified in the second. The fourth Order accepted CL&P's revised fuel adjustment clause which had been filed in compliance with the Commission's first Order. The Cities have now requested that this Court review these Commission Orders and remand them to the Commission with certain instructions. (Brief for Petitioners, p. 47).

1/ The Petitioners, hereinafter referred to collectively as the Cities, comprise the following parties: the City of Groton; Borough of Jewett City; Second Taxing District, City of Norwalk; Third Taxing District, City of Norwalk; City of Norwich; Town of Wallingford; and the Connecticut Municipal Gas and Electric Association. The Petitioners are referred to in their own Brief as the "Municipals". CL&P, however, is conforming to the designation generally utilized in the Commission's Orders.

The Commission derives its authority from Section 1 of the Federal Power Act (Act).2/ Section 205(e) of the Act provides, in pertinent part, that the Commission, either upon complaint or upon its own initiative, may enter into a hearing concerning the lawfulness of a rate schedule change filed with it, and further provides that the Commission may suspend the operation of such a rate schedule for a period of not longer than five months beyond the time when the rate schedule would otherwise go into effect:

> "[T]he Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect...and upon completion of the hearing and decision may...require such public utility...to refund, with interest...such portion of such increased rates or charges as by its decision shall be found not justified."
> 16 U.S.C. 824d(e)

By this suspension and refund power, Congress has given the Commission a means to protect the interests of public utility customers, whether the period of suspension be for one day or for any other period up to the statutory limit of five months. Municipal Light Boards of Reading and Wakefield Mass. v. FPC, 450 F.2d 1341 (D.C. Cir. 1971), explains how a suspension, even for one day, protects the interests of parties requesting the Commission to reject a rate filing:

2/ 16 U.S.C. 792

> "The suspension, and the FPC's findings leading it to order the suspension and hearing, have kept the burden of proof on Edison [the filing utility] to justify its proposed rate increase and have enabled the FPC to order refunds, with interest, of such portion of the increased rates as the FPC's decision may find not to be justified." 450 F.2d at 1351.

Rate suspension orders of federal regulatory agencies, such as the Commission, have consistently been held not to be subject to judicial review. In Arrow Transportation Co. v. Southern Ry. Co., 372 U.S. 658 (1963), the Supreme Court interpreted Section 15(7) of the Interstate Commerce Act[3/], which is practically identical to Section 205(e) of the Act. The Court held that the Interstate Commerce Commission (ICC) had discretion with respect to its utilization of its Section 15(7) suspension power. The Court stated:

> "We cannot believe that Congress would have given such detailed consideration to the period of suspension unless it meant thereby to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief. This Court has previously indicated its view that the present section [§15(7)] had that effect. In Board of Railroad Comm'rs v. Great Northern R. Co., 281 U.S. 412, 429, Chief Justice Hughes said for the Court: 'This power of suspension was entrusted to the Commission only'." 372 U.S. at 667.

3/ 49 U.S.C. §15(7).

Among the many cases which have followed the Arrow doctrine are U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 691 (1973); Port of New York Authority v. U.S., 451 F.2d 783, 788 (2d Cir. 1971); and Municipal Light Boards v. FPC, 450 F.2d 1341, 1350 (D.C. Cir. 1971). In addition, a District Court case in this Circuit, Freeport Sulphur Co. v. U.S., 199 F. Supp. 913, 916 (S.D. N.Y. 1961), anticipated Arrow, and was cited with approval by the Court in Arrow. 372 U.S. at 667.

The facts and issues in Municipal Light Boards are virtually indistinguishable from those in the instant case. That case held that the decision of whether the period of one day was a proper length for a suspension order was an act of unreviewable discretion of the Commission.

> "[The] fact that a decision not to suspend is committed by law to the agency's discretion supports the conclusion that the limited suspension order in this case is not subject to judicial review. Our ruling that the one-day suspension order is not subject to judicial review, either as to the granting of the one-day suspension or the denial of a five-month suspension, is in accord with this court's recent opinion in Associated Press v. FCC, _____ U.S. App. D.C. _____, 448 F.2d 1095 July 12, 1971)." 450 F.2d at 1351-1352.

Arrow and the decisions which have applied the Arrow doctrine, including the recent opinion of this Court in Port of New York Authority, supra, make this general proposition no longer an issue but rather a matter of settled law. In the instant case, utilization of the suspension power by the Commission in its first three Orders were acts committed by law to the Commission's discretion and are not subject to judicial review.

The fourth Order of the Commission, issued November 29, 1974, is not subject to review by this Court because the Cities have failed to follow the required statutory procedure, as set forth in Section 313 of the Act.4/ Within thirty days after the issuance of a Commission order and prior to a petition for review thereof to a Court of Appeals, the aggrieved party must apply to the Commission for a rehearing unless there is reasonable grounds for failure to do so. No such application for a rehearing was made by the Cities in this case. As a result of their failure to comply with the statutory procedure, the Cities are precluded from contesting the November 29, 1974 Order in this forum.

4/ 16 U.S.C. 8241.

There is yet another reason which precludes a review by this Court of the fourth Order and the first three Orders as well. The doctrine of administrative agency "primary jurisdiction" precludes such judicial review before there is final Commission action in the proceeding relating to all matters concerning CL&P's proposed R-2 Rate, which is still pending before the Commission.

When an agency acts within the bounds of its primary jurisdiction, its acts are not subject to judicial review, except in the narrowly prescribed exceptions discussed below. This doctrine, in the context of the ICC's authority, was explained by the Supreme Court in Atchison, Topeka and Santa Fe Ry. Co. v. Wichita Board of Trade, 412 U.S. 800 (1973).

> "National transportation policy reflects many often-competing interests. Congress has established an administrative agency that has developed a close understanding of the various interests and that may draw upon its experience to illuminate, for the courts, the play of those interests in a particular case. (citations omitted) Ordinarily, then, a court should refrain from expressing a preliminary view on what national transportation policy permits, before the ICC expresses its view." 412 U.S. at 820-821.

The Supreme Court has long recognized that courts and administrative agencies serve different purposes and that it is inappropriate for a federal court to assume the functions of regulatory bodies such as the Commission. In FPC v. Pacific Power & Light Co., 307 U.S. 156 (1939), the Court in discussing review of a Commission action stated:

> "In none of the situations in which an action of the Interstate Commerce Commission or of a similar federal regulatory body comes for scrutiny before a federal court can judicial action supplant the discretionary authority of a commission. A federal court cannot fix rates nor make decisions of joint rates nor relieve from the long-short haul clause nor formulate car practices." 307 U.S. at 160.

More recently, in Arrow, the Court delineated the importance of this doctrine. It warned of the consequences of judicial interference into areas properly within the domain of administrative agencies and held that the use of injunctive powers in matters still pending would interfere with the agency's primary jurisdiction to determine the lawfulness and reasonableness of filed rate schedules.

> "A court's disposition of an application for injunctive relief would seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable. But such consideration would create the hazard of forbidden judicial intrusion into the administrative domain. Judicial cognizance of reasonableness of rates has been limited to carefully defined statutory avenues of review. These considerations explain why courts consistently decline to suspend rates when the Commission has refused to do so, or to set aside an interim suspension order of the Commission. If an independent appraisal of the reasonableness of rates might be made for the purpose of deciding applications for injunctive relief, Congress would have failed to correct the situation so hazardous to uniformity which prompted its decision to vest the suspension power in the Commission." 372 U.S. at 669-671.

This Court has found the doctrine of primary jurisdiction to be the controlling consideration when asked to review an act of a regulatory agency which was within the agency's expertise. In Port of New York Authority, supra, it stressed what the result would be if acts within an agency's primary jurisdiction were reviewable.

> "[P]ermitting the courts to review appellate decisions [of the ICC] would encourage that very interference with the orderly review of tariff proposals that the doctrine of primary jurisdiction is intended to preclude." 451 F.2d at 787.

There are indeed some carefully circumscribed instances in which a federal court can review the disposition of an administrative agency that would otherwise be within the area of the agency's primary jurisdiction. Leedom v. Kyne, 358 U.S. 184 (1958), set forth a two-part test: (1) the order must be made in excess of the agency's delegated powers; and (2) it must be contrary to a specific statutory provision. In contrast, the record in this proceeding does not support any claim that the Commission has exceeded its delegated powers or has acted contrary to a specific provision of the Act. Cities, in their Brief at page 39, tacitly acknowledge that the Leedom test has not been met as such, and that there have been no violations of the express provisions of the Act. However, they ask this Court to rewrite the Act to include an illusory "Congressional mandate" which they claim should determine the "statutory parameters" of the Commission's jurisdiction, rather than basing such determination on the express language of the Act. Additionally, the Cities ask this Court to resort to legislative history for an explanation of Section 205(e) of the Act. The language of the statute in the instant case is perfectly clear. Where words are used in the usual and basic sense, they require no resort to legislative history. In any event, the proper

function of legislative history is to solve, rather than create, an ambiguity. See U.S. v. Blasius, 397 F.2d 203, 205-206 (2d Cir. 1968), cert. dism'd per Sup. Ct. R. 60, 393 U.S. 1008 (1969).

In Municipal Light Boards, supra, the court suggested that there were three situations in which there might be judicial review of an act otherwise within an agency's primary jurisdiction.

> "We do not speak to a case where the claim is that the suspension action taken or declined by the agency is plainly without any statutory authority or in defiance of a 'clear and mandatory' statutory command or reflects an error evident on the face of the papers - considerations which have been held to constitute an exception, a basis to judicial correction in the case of other types of agency action which Congress has withdrawn from judicial review jurisdiction." 450 F.2d at 1352.

None of these exceptions are to be found in the instant case. The Commission's actions were clearly within its statutory authority. There was no violation of any "clear and mandatory" statutory command. None of the Orders reflects an error evident on the face of the papers - although this last claim is unconvincingly made by the Cities.

The Cities apparently contend, at page 45 of their Brief, that an inconsequential typographical mistake contained in the Commission's first Order constitutes such "an error evident on the face of the papers." It was stated in that Order that the requested rate of return resulting from the rate filing would be 5.61% when the correct figure was 9.16%. In its second Order, the Commission corrected this mistake in the following manner:

> "In the Order of August 30, 1974, we stated that the realized rate of return was 5.61%. The Cities correctly pointed out that CL&P alleges that the apparent realized rate of return should properly be 9.16%. We were aware of this fact prior to our decision to suspend the filing by CL&P. The reference to CL&P's rate of return of 5.61% in our Order of August 30, 1974 was a typographical error which did not enter into our decision and which we shall correct in this Order." J.A. at 79.

In spite of the unjustified and unsupported contention of Cities denying the veracity of the Commission's statement that the typographical error did not enter into its decision, CL&P submits there is no basis for doubting the validity of the Commission's statement or the power of the Commission to acknowledge and correct a typographical mistake.

In conclusion, the actions taken by the Commission in the four Orders are within its primary jurisdiction and are not subject to judicial review. Further, none of the exceptions to the doctrine of primary jurisdiction is present in the instant case. Thus, the Arrow doctrine precludes judicial review of the exercise of the Commission's suspension power in the first three Orders, and the doctrine of primary jurisdiction forecloses the judicial review sought of all four Orders.

II. THE COMMISSION IS PROPERLY EXERCISING ITS STATUTORY POWER.

A. The Contentions Made by the Cities in Their Brief With Respect to the Details of the R-2 Rate Filing, Including the Original and Revised Fuel Adjustment Clause, Relate to Matters Within the Commission's Primary Jurisdiction Which Have Been and Will be the Subject of Consideration by the Commission.

Section 205(e) of the Act charges the Commission with the responsibility of determining the "lawfulness" of rate schedule changes. Although the Cities concede in their Brief at page 40 that "they seek no determination by this Court of the merits of the R-2 rate...," they inexplicably go on to ask in their prayers for relief that the instant case be remanded with instructions to the Commission to reject both the original and the revised fuel adjustment clauses. (Id., 47) The fuel adjustment clause is, of course, a part of the R-2 Rate. In order to grant such relief, this Court would necessarily have to undertake a review of "the merits of the R-2 Rate" and thereby undertake the "forbidden judicial intrusion" into the primary jurisdiction of the Commission. See Arrow, supra.

B. The Commission Properly Exercised its Statutory Suspension Power.

The Cities, at page 24 of their Brief, contend that the Commission, without basing its decision on any findings or standards, has embarked on an "unprecedented policy" regarding the exercise of its statutory suspension power under Section 205(e) of the Act. However, there has been no showing by the Cities of a change in any of the Commission's suspension policies in the instant case. The four Orders do not provide any basis for finding the alleged change in Commission policy. The issuance of a one-day suspension in this proceeding does not, in fact, represent an unprecedented Commission policy as is conclusively demonstrated by the precedent of the 1971 Municipal Light Board case, supra.

Cities claim in their Brief that the Commission is "automatically suspending rate change schedules for nominal periods only" (at p. 36), and has not addressed itself to "the unique circumstances of each case" (at p. 39). They now acknowledge, in a departure from their position before the Commission, that the Commission has the right to determine the proper length of any suspension under its primary jurisdiction. (See p. 40)

The Commission in the instant case has in fact given full and adequate consideration in arriving at its decision to suspend the CL&P R-2 Rate filing for one day. In the first Order, the Commission stated the following reason for issuing the one-day suspension:

> "Our review of CL&P's filing and the issues raised therein indicates that the proposed changes have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory, preferential or otherwise unlawful. Accordingly, we shall suspend the proposed changes for one day and establish hearing procedures to determine the justness and reasonableness of CL&P's filing." J.A., at 41.

The Commission reaffirmed and broadened this explanation in its third Order.

> "Upon further consideration of the information available to us, including the representations and supporting factual data submitted by [CL&P] as a part of its filing herein, and the subject petition and other pleadings filed by the intervenors, we reaffirm our decision to suspend [CL&P's] proposed rate R-2 for one day." J.A., at 109.

The Commission's statements refute the unsupported claim of Cities that the Commission has adopted an automatic suspension

policy which does not take into consideration the merits and circumstances of each filing.

Curiously, if in fact the Commission had issued suspension orders automatically rather than upon the circumstances of the individual filing, it would be the filing utility, rather than parties such as Cities, which would have grounds for complaint. Section 205(e) of the Act conditions the exercise of the Commission's suspension power on the "...delivering to the public utility affected thereby a statement in writing of its reasons for such suspension." Congress recognized that exercise of the suspension power would have an adverse effect on the filing public utility by preventing, for a period of time, the effectiveness of a rate schedule which might subsequently be found to be justified upon completion of the Commission's hearing. Therefore, Congress required the Commission to justify its suspension actions to the filing utility and to no other party.

C. The Commission Properly Accepted CL&P's Proposed Changes in Its Rates and Charges.

At page 15 of their Brief, the Cities contend that the Commission erred in failing to reject the filing utility's rate schedule pursuant to Section 35.5 (18 C.F.R. § 35.5) of the Commission's Regulations claiming that the rate filing did not precisely conform to the requirements of Section 35.13(b)(1) (18 C.F.R. § 35.13(b)(1).)

> "The Secretary,...shall reject any material submitted for filing with the Commission which patently fails to substantially comply with the applicable requirements set forth in [these Regulations]". (Emphasis added) 18 C.F.R. § 35.5.

Obviously it is within the Commission's primary jurisdiction to decide what constituted substantial compliance with the applicable requirements and what omissions constitute patent failure to comply.

In Municipal Light Boards, supra, the Court in noting that the purpose of the Commission's filing regulations is to ensure that the Commission has before it adequate information, stated:

> [The filing rules at issue] are "mere aids to the agency's independent discretion; and in both language and purpose leave room for a doctrine of 'substantial' or 'reasonable' compliance. American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539, 90 S. Ct. 1288, 25 L. Ed. 2d 547 (1970). We cannot say that the FPC was unreasonable in finding the filing sufficiently complete for it to be able to decide whether or not to investigate and suspend the increased rate.* * * As to the present issue, we think the FPC cannot be held to be unreasonable in its failure to reject the entire filing ab initio, even though the utility did not comply rigorously with the letter of the regulations." 450 F.2d at 1348.

The filing requirement claimed by Cities not to have been complied with pertains to a statement made pursuant to Section 35.13(b)(1) of the Commission's Regulations. The Commission required that this statement be filed within 30 days of its Order of November 29, 1974. This has been done by CL&P and any claim by Cities in this regard would appear to be moot.

D. The Commission Properly Accepted For Filing CL&P's Original R-2 Fuel Adjustment Clause.

Cities contend, at page 16 of their Brief, that CL&P failed to comply with Section 35.14 of the Commission's Regulations in that the original R-2 fuel adjustment clause allegedly did not conform with Commission's Opinion No. 633,

New England Power Company, 48 F.P.C. 899 (1972), and was therefore "illegal." Cities assert that such alleged non-compliance should have resulted in the Commission's outright rejection of the fuel adjustment clause under Section 35.5. The argument of Cities, however, is premised on their false assumption that the Commission found CL&P's fuel adjustment clause to be "illegal". In fact, the Commission made no such finding but instead stated the following:

> We note that CL&P's proposed fuel adjustment clause imputes the Company's own fuel cost variations to its purchased energy, and thus is subject to suspension since it may result in rates which are not just and reasonable. Accordingly, we shall provide for the filing of a fuel adjustment clause which conforms to Opinion No. 633. J.A., p. 17.

Rather than finding that the fuel adjustment clause was illegal, the Commission found that the original R-2 fuel adjustment clause "may result in rates which are not just and reasonable".

CL&P takes strenuous exception to the questionable tactic by Cities of suggesting that when the Commission states that a fuel adjustment clause may result in rates which are not

just and reasonable, this automatically means that the fuel adjustment clause is illegal.

Cities position, if followed, would require the Commission to reject outright every rate filing which, upon preliminary review and without hearing, is found to be possibly unjust or unreasonable. If Congress had intended such an extreme result, it presumably would have so provided in the Act.

III. CITIES ARE NOT ENTITLED TO THE INJUNCTIVE REMEDY THEY REQUEST.

A. Only The Commission May Exercise The Power To Suspend The Proposed Rate Change.

In view of the virtual identity of rate change provisions in the Interstate Commerce Act5/ and the Federal Power Act6/, the Supreme Court's holding in Arrow, supra, is dispositive of Cities request for injunctive relief. There the Court held that Congress had vested in the ICC "the sole and exclusive power to suspend (proposed rate changes) and (had withdrawn) from the judiciary any pre-existing power to grant injunctive relief." 372 U.S. at 667.7/

The basis of the withdrawal of the power to grant injunctive relief under the circumstances of the instant

5/ 49 U.S.C. § 15(7)

6/ 16 U.S.C. § 824d(e)

7/ See U.S. v. SCRAP, 412 U.S. 669, 690-699 (1973); See also, Port of New York Authority v. U.S., 451 F.2d 783, 787-788 (2d Cir. 1971) where this Court, relying on Arrow, affirmed a district court decision denying a request for a restraining order of an I.C.C. interim rate increase.

proceeding is the doctrine of primary jurisdiction. Atchison, T&S.F. Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800 (1973), involved a challenge to the validity of an ICC order approving a rate increase which appeared to depart from settled ICC precedent. The Supreme Court, while affirming the District Court's remand to the ICC for clarification and justification of its departure from prior decisions, reversed as to the lower court's injunction against the implementation of the proposed new charges. Citing Arrow, the Court stated:

> "When a case is remanded on the ground that the agency's policies are unclear, an injunction ordinarily interferes with the primary jurisdiction of the Commission." 412 U.S. at 822.

The Commission's one-day suspension order was consistent with the express provisions of the Act. The Act specifies that "the Commission . . . may suspend the operation of such [rate] schedule . . . but not for a longer period than five months beyond the time it would otherwise go into effect."8/ The only limitation which Congress has imposed on the Commission is that it cannot extend the suspension beyond

8/ 16 U.S.C. § 824d(e)

five months. The Commission's imposition of a one-day suspension in the instant case does not violate any provision of the Act. Accordingly, there is no justification for this Court to depart from the settled policy of non-interference with the Commission's primary jurisdiction by issuing an injunction.

B. Cities Have Suffered No Irreparable Harm.

Apart from considerations of primary jurisdiction, Cities have failed to demonstrate that irreparable harm will result if an injunction is not issued and they ultimately prevail on the merits.9/ Cities contend in the Brief at page 44, that, "(a)s for the showing of irreparable injury to Petitioners, see J.A. 27-39, 44-65, 87-95." Cities, by this virtually all-inclusive reference, have incorporated in their Brief the entire contents of three separate pleadings filed by them with the Commission. The scope of those pleadings is exceedingly broad and is in no way limited to the issue of the alleged irreparable injury to the Cities. Presumably, Cities are claiming that unless CL&P's R-2 Rate

9/ See Atchison, T&S.F. RY. Co. v. Wichita Bd. of Trade, 412 U.S. at 821-823.

schedule is now enjoined, they will be injured if the Commission eventually revises such rates downward. This is clearly not the case because of the refund provision of the Act which becomes applicable when a suspension order issues. Cities are protected in such event because of the statutory authorization for the Commission to order CL&P to refund, with interest, any portion of the increase ultimately found to be unjustified. In Atchison, the Court recognized that similiar refund provisions under the Interstate Commerce Act made it quite unlikely that a rate increase pending a final determination would cause irreparable damage.10/ Since Cities have not convincingly explained why the refund provision does not adequately protect their interests in this case, no showing of irreparable harm has been made.

In conclusion, there is no basis upon which injunctive relief may be granted as Congress has withdrawn the power to issue an injunction under these circumstances and Cities have failed to show any irreparable harm.

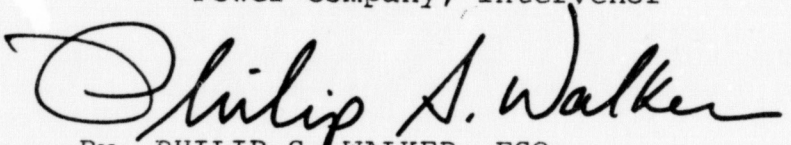
10/ 412 U.S. at 824.

CONCLUSION

The Connecticut Light and Power Company, Intervenor, requests that the Petition for Review be dismissed with prejudice for the reasons set forth above.

Respectfully submitted,

The Connecticut Light and
Power Company, Intervenor



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